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SEOW KOON GUAN v. PUBLIC PROSECUTOR

[C.C.A. (Wee Chong Jin C.J., Kulasekaram and D'Cotta JJ.) January 24, 1978]

[Singapore — Criminal Appeal No. 4 of 1977]

Criminal Law and Procedure — Charge of doing act for purpose of trafficking in a controlled drug — Whether mere possession of quantity of controlled drug sufficient to constitute offence — Presumption of possession for the purpose of trafficking therein — Need to prove doing of or offering to do act — Act preparatory to or for the purpose of trafficking.

Misuse of Drugs — Trafficking or mere possession — Misuse of Drugs Act, 1973, ss. 3(c) & 6(a).

This was an appeal against the conviction of the appellant on a charge that he did an act for the purpose of trafficking in a controlled drug by having in his possession a quantity of the drug. The appellant had been sentenced to death on that charge. The prosecution in this case had proved that the appellant was in possession of 55.48 grams of diamorphine and from that they relied on the statutory presumption that the appellant had the controlled drug "for the purpose of trafficking therein."

Held: (1) possession *per se* of a controlled drug constitutes an offence under section 6(a) of the Misuse of Drugs Act, 1973; there is however no other provision making it an offence for a person to be in possession of a controlled drug "for the purpose of trafficking therein";

(2) where the quantity of the controlled drug attracts the statutory presumption that the possession of the controlled drug is for the purpose of trafficking therein, the person in possession can be charged with and found guilty of an offence under section 3(c) of the Misuse of Drugs Act, 1973 if it can be proved that he did or offered to do any act preparatory to or for the purpose of trafficking therein;

(3) an essential ingredient of the offence under section 3(c) of the Act is the doing of or offering to do an act preparatory to or for the purpose of trafficking in a controlled drug. Mere possession of a controlled drug for the purpose of trafficking therein does not however constitute the doing of an act for the purpose of trafficking therein;

(4) the conviction under section 3(c) of the Act must be quashed and a conviction for possession under section 6(a) of the Act substituted therefor and the appellant sentenced to imprisonment for a term of ten years.

COURT OF CRIMINAL APPEAL.

Datuk David Marshall for the appellant.

E.C. Foenander (Deputy Public Prosecutor) and *R.G. Neighbour* (Deputy Public Prosecutor) for the respondent.

Datuk David Marshall: All the facts and the law on which the conviction, the subject matter of this appeal is based are neatly encapsulated by their Lordships of the trial court as follows: "We were satisfied that the accused by having in his possession 55.48 grams of diamorphine did an act for the purpose of trafficking in them; in our view the accused had not rebutted the presumption raised against him by virtue of section 15 of the Misuse of Drugs Act 1973 (No. 5 of 1973) on a balance of probabilities". It is submitted that the application of the presumption created by 15(c) of the Act being the basis of this conviction, its invalid utilisation vitiates such conviction. Of far graver import is the basic fallacy in the reasoning of their Lordships of the trial court which equated section 15(c) with section 3(c) of the Act when they held — "the accused by having in his possession 55.48 grams of diamorphine did an act for the purpose of trafficking in them." The gravity lies in the fact that "doing an act for the purpose of trafficking in a controlled drug" is an offence created by section 3(c) of the Act, and any such act involving more than 15 grams attracts, on their Lordships' reading, the mandatory death penalty.

In holding "the accused by having in his possession 55.48 grams of diamorphine did an act for the purpose of trafficking in them" their Lordships equated their conclusion "the accused had in his possession 55.48 grams of diamorphine for the purpose of trafficking therein" with "the accused did an act for the purpose of trafficking in 55.48 grams of diamorphine" in order to bring the fact of possession plus the legal presumption under 15(c) within the definition of section 3(c) of the Act which reads "... it shall be an offence for a person, on his own behalf or on behalf of any other person, whether or not such other person is in Singapore to ... do or offer to do any act preparatory to or for the purpose of trafficking in a controlled drug." Such an equation is a jump to a different plane that is neither authorised by statutory presumption nor according to logic, good sense, juristic principles or legal precedents.

The word "act" in section 2 of the Interpretation Act reads, "'act', when used with reference to an offence or civil wrong, includes a series of acts, and words which refer to acts done shall be construed as extending to illegal omissions", Possession is a *concept* of legal relationship between a person and an object. "Doing an act" is *conduct* requiring voluntary muscular movement registrable visually and/or aurally. The equation of possession with action, which is the basis of this conviction and sentence of death violates language and logic.

Parliament has in section 6(a) of the Act created the specific offence of unlawful possession of a controlled drug and in the second Schedule to the Act it has made provisions for the punishment of such an offence — "Maximum 10 years or $20,000 or both. Minimum for second or subsequent offence 2 years or $4,000 or both". It is an affront to the legislature to suggest that it seeks through a devious, circuitous route to impose for unlawful possession of a controlled drug the draconian punishments, including mandatory death, provided for trafficking in them, whilst creating in general terms the offence of unlawful possession only for minimal quantities.

Both common usage and juristic understanding require bodily movement to constitute an act. *Austin* in his "Lecturers on Jurisprudence" (at page 421 of his 19th Lecture) said "the bodily movements which immediately follow our desires of them are acts." *Sir William Markby* in "Elements of Law", 6th Edition, paragraph 215 stated, "An act is the bodily movement which follows immediately upon volition ... without a bodily movement no act can be done". *Mr. Justice Oliver Wendell Holmes* in "The Common Law", 43rd printing at page 91 defined an act as "a voluntary muscular contraction and nothing else."

Having possession does not involve bodily movement or muscular construction. *Smith & Hogan* in their "Criminal Law" bring out in sharp focus the distinction between "act" and "possession" at page 40: "'Being in possession' does not involve an act in the sense of a muscular movement at all, for a man may possess goods merely by knowingly keeping them in his house." In *Dugdale* 118 E.R. 499, *Coleridge J.* stated, "The Law will not take notice of an intent without an act. Possession is no such act". In *Poon Soh Har & Anor.* v. *Public Prosecutor* [1977] 2 M.L.J. 126, the Court Criminal Appeal stated at 128C Column 1, "To possess a drug for the purpose of trafficking therein, is, as already pointed out, something totally different from the act of "trafficking" as defined in section 2 of the Act."

E.C. Foenander, Senior State Counsel for the Public Prosecutor, conceded that the accused could not be convicted under section 15 of the Misuse of Drugs Act. He urged the court to substitute the sentence to one of unlawful possession rather than trafficking.

Wee Chong Jin C.J.: The appellant, Seow Koon Guan, was convicted by the High Court and sentenced to death on the following charge, namely:—

"That you, Seow Koon Guan, on or about the 18th day of March 1976 at about 7.10 p.m. at Block 67, No. 154-C, Ganges Avenue, Singapore, not being authorised by the Misuse of Drugs Act, 1973 (No. 5 of 1973) or the regulations made thereunder, did an act for the purpose of trafficking in a controlled drug specified in Class 'A' of Part I of the First Schedule of the Misuse of Drugs Act, 1973 (No. 5 of 1973), to wit, by having in your possession 55.48 grammes of diamorphine, and

you have thereby committed an offence under section 3(c) of the Misuse of Drugs Act, 1973 (No. 5 of 1973) and punishable under section 29 of the aforesaid Act, 1973 (No. 5 of 1973)."

He appealed against his conviction and at the conclusion of the hearing of the appeal we allowed the appeal, set aside the conviction and sentence, substituted a conviction under section 6(a) of the Misuse of Drugs Act 1973 for possession of 55.48 grams of diamorphine and sentenced him to imprisonment for a term of ten years. We now give our reasons.

The prosecution case which was accepted by the trial judges was that the appellant was seen throwing away from his kitchen balcony a paper bag when confronted by a narcotics officer. The paper bag was immediately recovered and inside it was a chocolate box. Inside the chocolate box were six plastic packets of a brownish substance. The brownish substance, on analysis, was found to contain 41.11 grams of diamorphine. Another 14.37 grams of diamorphine were found in an earthenware pot underneath the kitchen table.

The appellant in his defence admitted that he had bought the diamorphine found in the earthenware pot for his own consumption. He denied throwing away a paper bag from the kitchen balcony.

The trial judges disbelieved the appellant's denial and found that he threw the paper bag away because he knew its contents and with a view to getting rid of incriminating evidence. They found that the appellant "by having in his possession 55.48 grams of diamorphine did an act for the purpose of trafficking in them." They found that the appellant had failed to rebut the presumption raised against him by virtue of section 15 of the Misuse of Drugs Act, 1973 (hereinafter referred to as "the Act") which reads:—

"15. Any person who is proved or presumed to have had in his possession more than —

(c) 2 grammes of diamorphine (heroin) contained in any controlled drug

shall, until the contrary is proved, be presumed to have had such controlled drug in his possession for the purpose of trafficking therein."

Accordingly, they found him guilty of having committed an offence under section 3(c) of the Act. Section 3 of the Act reads:—

"3. Except as authorised by this Act or the regulations made thereunder, it shall be an offence for a person, on his own behalf or on behalf of any other person, whether or not such other person is in Singapore to —

(a) traffic in a controlled drug;

(b) offer to traffic in a controlled drug; or

(c) do or offer to do any act preparatory to or for the purpose of trafficking in a controlled drug."

On the evidence before the trial judges, all that the prosecution had proved was that the appellant had in his possession 55.48 grams of diamorphine. From that fact of possession the prosecution was entitled to rely on section 15 of the Act to raise against the appellant a statutory presumption that the appellant had in his possession this quantity of diamorphine, a controlled drug, "for the purpose of trafficking therein."

It is to be observed, however, that there is no provision in the Act which makes it an offence under the Act for a person to be in possession of a controlled drug "for the purpose of trafficking therein." There is a provision in the Act for possession of a controlled drug (see section 6(a)). There is a provision in the Act for trafficking in a controlled drug (see section 3(a)). There is a provision in the Act for offering to traffic in a controlled drug (see section 3(b)). There is a provision in the Act for doing or offering to do *any act* preparatory to or for the purpose of trafficking in a controlled drug (see section 3(c)). Under section 3(c) the prosecution, although, after proving possession, it can rely on the statutory presumption under section 15, must also prove that the accused person —

(i) did an act or acts preparatory to trafficking in a controlled drug; or

(ii) did an act or acts for the purpose of trafficking in a controlled drug; or

(iii) offered to do an act or acts preparatory to trafficking in a controlled drug; or

(iv) offered to do an act or acts for the purpose of trafficking in a controlled drug.

In our judgment, possession *per se* of a controlled drug constitutes an offence under section 6(a) of the Act only. However, if the quantity possessed attracts the statutory presumption under section 15 that the possession of the controlled drug is for the purpose of trafficking therein, the person in possession can be charged with and found guilty of an offence under section 3(c) of the Act if it can be proved that he did or offered to do any act preparatory to or for the purpose of trafficking therein. The language of section 3(c) is plain and unambiguous. An essential ingredient is the doing of or offering to do an act preparatory to or for the purpose of trafficking in a controlled drug and, in our judgment, mere possession of a controlled drug for the purpose of trafficking therein does not constitute the doing of an act for the purpose of trafficking therein.

For all these reasons we allowed the appeal and substituted a conviction for possession under section 6(a) of the Act.

Appeal allowed.

Solicitors: *David Marshall.*